In The

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-6523

WILLIAM ROLAND ROBERTS,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OHIO

HARVEY B. WOODS
1212 Second National Bldg.
830 Main Street
Cincinnati, Ohio 45202
(513) 241-3545

PROOF OF SERVICE

I hereby certify that I have served the foregoing Appendix To Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio upon the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and upon the Prosecuting Attorney, Hamilton County, Ohio, Hamilton County Court House, Cincinnati, Ohio 45202, by mailing a copy thereof by First Class Mail, postage prepaid, this _____ of April, 1977, and I further certify that I am a member of the bar of this Court.

Harvey B. Woods

HARVEY B. WOODS
1212 Second National Bldg.
Cincinnati, Ohio 45202
(513) 241-3545
Attorney for Petitioner

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BARNETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 76 TERM
To wit: December 15, 1976

State of Ohio,
Appellee,

vs.

William Roland Roberts,
Appellant.

No. 76-558

APPEAL FROM THE COURT OF APPEALS

for HAMILTON *County*

This cause, here on appeal from the Court of Appeals for HAMILTON *County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed;* for the reasons set forth in the opinion rendered herein and it appearing to the Court that the date heretofore fixed for the execution of the judgment of the Court of Common Pleas is now past, this Court proceeding as required by law does hereby fix the 15th day of February, 1977, as the date for carrying said sentence into execution by the Superintendent of the Southern Ohio Correctional Facility, or in his absence by the Assistant Superintendent, in accordance with the statutes in such case made and provided.

It is further ordered that a certify copy of this entry and a warrant under the seal of this Court be duly certified to the Superintendent of the Southern Ohio Correctional Facility and the Superintendent make due return thereof to the Clerk of the Court of Common Pleas of Hamilton County,

and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the COMMON PLEAS COURT *to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for* HAMILTON *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19.....

FOR YOUR INFORMATION ONLY. NOT FOR FILING

Clerk

Deputy

4

BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 76 TERM
To wit: December 15, 1976

State of Ohio,
Appellee,

vs.

William Roland Roberts,
Appellant.

No. 76-558

MANDATE

To the Honorable COMMON PLEAS COURT

Within and for the County of HAMILTON, *Ohio, Greeting:*

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.

It is also ordered that the execution date be set for Tuesday, February 15, 1977.

THOMAS L. STARTZMAN,
Clerk

.....*19*.....

.....

.....*Deputy*

RECORD OF COSTS

Docket Fee . . . . . $..... *Paid by* Affidavit of Poverty

Docket Fee . . . . . $..... *Paid by*.....

Docket Fee . . . . . $..... *Paid by*.....

Printing Record . . . . . $..... *Paid by*.....

Supplemental Record . . $..... *Paid by*.....

Sheriff's Costs . . . . . $..... *Paid by*.....

Sheriff's Costs . . . . . $..... *Paid by*.....

Counsel for Parties.

THE STATE OF OHIO, APPELLEE, *v.* ROBERTS, APPELLANT.

[Cite as State v. Roberts (1976), 48 Ohio St. 2d 221.]

Criminal law—Aggravated murder—Death penalty imposed—Trial—Alleged errors in voir dire, admission and sufficiency of evidence, instructions to jury—Not prejudicial, when—Crim. R. 30, construed.

(No. 76-558—Decided December 15, 1976.)

APPEAL from the Court of Appeals for Hamilton County.

Appellant, William R. Roberts, was convicted of aggravated murder with a specification, and of aggravated robbery, felonious assault, and three counts of kidnapping. The indictment specified that the murder was committed while appellant was in the commission of an aggravated robbery, one of the aggravating circumstances listed in R. C. 2929.04(A). The jury found that the specification had been proven beyond a reasonable doubt. Thereafter, none of the mitigating factors enumerated in R. C. 2929.04 (B) was established, and the trial court, as required by R. C. 2929.03, sentenced appellant to death on the aggravated murder conviction, and to imprisonment from seven to twenty-five years on the second count, from five to twenty-five years on the third count, and from seven to twenty-five years on each of the fourth, fifth and sixth counts of the indictment, all to run consecutively, should the death sentence be modified by another court.

The Court of Appeals affirmed the judgment of the trial court, and the cause is now before this court upon an appeal as of right.

Mr. Simon L. Leis, Jr., prosecuting attorney, *Mr. Fred J. Cartolano, Mr. Robert R. Hastings, Jr.*, and *Mr. David Davis*, for appellee.

Mr. Harvey B. Woods, for appellant.

Opinion *Per Curiam.*

Per Curiam. The state presented evidence that appellant, who already had kidnapped and was holding one Patricia Sue Ramey, abducted Mr. and Mrs. William H. Reed on August 5, 1974, and took them to their home in Cincinnati. Appellant bound the Reeds, took their money, struck Mrs. Reed, and eventually choked Mr. Reed to death. Witnesses at trial included Ramey, Mrs. Reed and appellant.

Appellant submits that the removal of prospective jurors for cause, upon motion of the prosecution, when such jurors express an opinion opposing capital punishment, but indicate they could determine the guilt or innocence of defendant based on the evidence, is reversible error under *Witherspoon* v. *Illinois* (1968), 391 U. S. 510.

This court has held that upon examination of a prospective juror to determine whether he should be disqualified from a capital case due to his opposition to the death penalty, the most that can be demanded of him is that he consider all the penalties provided by state law, and that he not be irrevocably committed before trial to voting against the death sentence regardless of the facts. *State* v. *Watson* (1971), 28 Ohio St. 2d 15, 275 N. E. 2d 153. This court has expressly pointed out that the essential holding of *Witherspoon* is its prohibition of the death sentence if the jury imposing or recommending it excluded veniremen for cause merely because they voiced general objections to capital punishment or expressed conscientious or religious scruples against it. *State* v. *Wilson* (1972), 29 Ohio St. 2d 203, 208, 280 N. E. 2d 915. Decisions handed down by this court, in light of *Witherspoon*, have entailed the careful interpretation of the language utilized by respective courts, litigants, and veniremen in asking and answering whether veniremen would "*automatically* vote against the imposition of the death penalty." *State* v. *Anderson* (1972), 30 Ohio St. 2d 66, 69, 282 N. E. 2d 568. See, also, *State* v. *Bayless* (1976), 48 Ohio St. 2d 73, —— N. E. 2d ——.

The statutes of this state have provided that a person called to serve as a juror may be challenged in the trial of a capital offense for the cause that his opinions preclude

Opinion *Per Curiam.*

him from finding the accused guilty of an offense punishable with death. R. C. 2945.25(C). Crim. R. 24, effective July 1, 1973, encompasses no explicit parallel to R. C. 2945.25(C). However, Crim. R. 24(B)(9) does provide that a person called as a juror may be challenged for cause if he possesses a state of mind evincing insurmountable bias toward the defendant or the state. Crim. R. 24(B)(14) similarly provides that a person called as a juror may be challenged for cause if he is unsuitable for service as a juror for reasons other than those expressly laid out in the rule. The wording of Crim. R. 24 is sufficiently broad to render unsuitable, as one who may be challenged for cause,[1] a juror of the type accounted for by R. C. 2945.25(C).

Our review of the record indicates that sufficient reason existed for the trial court to believe that those jurors declared disqualified could not determine upon the evidence the guilt or innocence of the accused, but would automatically vote against a verdict which might lead to capital punishment. The removal of thus biased prospective jurors for cause does not constitute reversible error.

Appellant complains that a mistrial should have been declared because of certain statements made by the prosecutor in the presence of the jury. The remarks dealt with an "admission" made by appellant, which we find to have been admissible as an exception to the rule against hearsay, and which was erroneously excluded by the trial court. See McCormick on Evidence (2d Ed.), 629-30 (1972). Under such circumstances, no error prejudicial to appellant occurred. Furthermore, the court in its general charge correctly instructed the jury that no comment made by counsel or by the court is evidence.

Appellant urges that the refusal of the trial court to permit counsel for appellant to confer in front of the bench during cross-examination of a prosecution witness constitutes prejudicial error. Our examination of the record

[1] "The language of Criminal Rule 24(B)(14) is sufficiently broad * * * to include the unsuitability of a juror in a capital case." Schroeder and Katz, 2 Ohio Criminal Law and Practice 229 (1974).

on this point does not disclose an abuse of discretion by the trial court which would warrant or necessitate a reversal of this cause.

Appellant submits that it was prejudicial error for the trial court to permit, over the objection of the defense, the redirect examination of a prosecution witness relative to another alleged crime involving the appellant, after defense counsel had questioned the witness on cross-examination regarding where the appellant had received money, and the witness answered that some was obtained from other robberies. R. C. 2945.59 provides that in any criminal case in which the defendant's intent or system is material, acts of the defendant tending to show his intent or system may be proved, whether they are prior or subsequent thereto, notwithstanding that such proof may tend to show the commission of another crime by the defendant. See *State* v. *Hector* (1969), 19 Ohio St. 2d 167, 249 N. E. 2d 912; *State* v. *Moorehead* (1970), 24 Ohio St. 2d 166, 265 N. E. 2d 551; *State* v. *Burson* (1974), 38 Ohio St. 2d 157, 311 N. E. 2d 526; *State* v. *Cox* (1975), 42 Ohio St. 2d 200, 327 N. E. 2d 639; and *State* v. *Curry* (1975), 43 Ohio St. 2d 66, 330 N. E. 2d 720. Inasmuch as the subject of the redirect examination was brought out by counsel for appellant during cross-examination,[1] and since counsel for appellant indicated that evidence produced by appellant did tend to prove a system, we cannot agree that prejudicial error obtained.

Appellant argues the trial court erred in failing to instruct the jury regarding the law of same and similar crimes at the time of the testimony of such crimes over defense objection, and in not fully explaining, in its general charge to the jury, the purpose for which such testimony was admitted. Failure of a trial court in a criminal prosecution to admonish the jury, when evidence of same or similar acts is introduced under R. C. 2945.59, that such evidence

[1]The practice is uniform that redirect examination may include new matter drawn out in the next previous examination. McCormick on Evidence (2 Ed.), 64 (1972).

cannot be considered substantive evidence of the crime charged, and to limit the purpose for which such evidence is received, can, under appropriate circumstances, constitute error. However, counsel for appellant failed to register an objection regarding the instructions of the trial court to the jury and, therefore, he is precluded from assigning the omission as error. Crim. R. 30. The soundness of this rule has long been recognized by this court. See *State* v. *Nelson* (1973), 36 Ohio St. 2d 79, 85, 303 N. E. 2d 865. Moreover, a judgment of conviction is not to be reversed because of the admission of any evidence offered against a defendant or because of a misdirection of the jury, unless the defendant was or may have been prejudiced thereby. Crim. R. 33(E)(3) and (4). Even if we were to address as error the trial court's failure to instruct the jury as to the law of same and similar crimes at the time of the testimony of such crime, or the failure of the trial court fully to explain for jurors the purpose for which such testimony was admitted in its general charge, the instant record would compel a conclusion that such was harmless error beyond a reasonable doubt. *State* v. *Crawford* (1972), 32 Ohio St. 2d 254, 291 N. E. 2d 450.

Appellant contends that an instruction to the jury upon the aggravated murder charge, as alleged in the indictment, constituted prejudicial error by the trial court. Apparent confusion on the part of the trial court relative to the law of aggravated murder led to an exchange between the trial court, the prosecution, and counsel for appellant. The argument of appellant is that it was not necessary that counsel for appellant bring the alleged error to the attention of the trial court because this had been done by the prosecution.

Crim. R. 30, in relevant part, provides:

"A party may not assign as error the giving or the failure to give any instruction unless *he* objects thereto before the jury retires to consider its verdict, stating specifically the matter to which *he* objects and the grounds of *his* objection." (Emphasis added.)

Opinion *Per Curiam.*

The language of the rule does not allow for the interpretation which appellant would impose upon it.

Appellant states that the trial court's instruction that the jury might consider evidence of other acts as proof that appellant performed as alleged in the indictment constituted prejudicial error by the trial court. Appellant did not call the attention of the trial court to the allegedly prejudicial error attacked here, but suggests that because this was an error of commission by the trial court it was not one to be called to the court's attention. To the contrary, however, Crim. R. 30 puts the burden of timely objection upon the party making the subsequent assignment of error; this applies to the positive giving of instructions to the jury as well as the omission of them. The trial court's charge regarding evidence as to similar acts was not as good as possible, but upon our examination of the record we have no reason to believe that the jury was misled.

Appellant complains that the trial court's refusal to charge the jury on the included offense of murder was reversible error. Appellant suggests that the jury might have found appellant guilty of murder (but not aggravated murder) even though a felony had been committed, the felony being completed by the time of the homicide.

If the trier of fact "could *reasonably* find agninst the state for the accused upon one or more of the elements of the crime charged and for the state and against the accused on the remaining elements, which by themselves would sustain a conviction upon a lesser included offense, then a charge on the lesser included offense is both warranted and required, not only for the benefit of the state but for the benefit of the accused." *State* v. *Nolton* (1969), 19 Ohio St. 2d 133, 135, 249 N. E. 2d 797; *State* v. *Carver* (1972), 30 Ohio St. 2d 280, 290, 285 N. E. 2d 26; and *State* v. *Fox* (1972), 31 Ohio St. 2d 58, 64, 285 N. E. 2d 358. But this contention of appellant fails, because the record at bar does not establish that the jury could reasonably find the non-homicide felony complete by the time of the murder.

Statement of the Case.

Appellant asserts that the evidence adduced was insufficient in law to support the jury's verdict. However, upon reviewing the record, it is our conclusion that sufficient probative evidence was adduced upon each of the essential elements of the crimes charged. Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

FIRST APPELLATE DISTRICT

HAMILTON COUNTY, OHIO

B-743159

4-19-76

STATE OF OHIO, NO. C-75379

Appellee,

vs.

WILLIAM ROLAND ROBERTS, JUDGMENT ENTRY.

ENTERED
APR 19 1976
IMAGE 28

To the Clerk:
Enter upon the journal of the court.

Presiding Judge

Appellant,

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are not well taken for the reasons set forth in the Decision filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Hamilton County, Ohio, be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Decision attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellant, by his counsel, excepts.

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO, : NO. C-75379

Plaintiff-Appellee, :

vs. : D E C I S I O N.

WILLIAM ROLAND ROBERTS, :

Defendant-Appellant. :

Messrs. Simon L. Leis, Jr., Fred J. Cartolano and Robert R. Hastings, Jr., 420 Hamilton County Courthouse, Court & Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. Harvey B. Woods, 1212 Second National Building, 830 Main Street, Cincinnati, Ohio 45202, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, the transcript of the proceedings, assignments of error, briefs and oral arguments of counsel.

Defendant-appellant, William Roland Roberts, was charged in a single indictment with aggravated murder, three counts of kidnapping, aggravated robbery, and felonious assault. The indictment also contained a specification listed in division (A) of R. C. 2929.04. Appellant entered pleas of not guilty and not guilty by reason of insanity. A jury found him guilty on all six counts and, in addition, guilty of the specification. Subsequently, the court

sentenced appellant to consecutive terms of imprisonment on the kidnapping, aggravated robbery, and felonious assault convictions. With respect to the aggravated murder, after a hearing mandated by R. C. 2929.03(D), appellant was sentenced to death as provided by law.

Appellant urges nine assignments of error, the first of which follows:

> The court erred in excusing prospective jurors for cause by the prosecution when they expressed an opinion on opposition to capital punishment, even though they did indicate they could determine the guilt or innocence of the defendant.

In his brief, appellant lists the names of six prospective jurors who were excused for cause even though they indicated, upon voir dire examination, that they could determine the guilt or innocence of the defendant despite their personal opposition to capital punishment. This assertion by appellant notwithstanding, all six prospective jurors, at some point in the questioning by the court or counsel, either stated unequivocally that they could not, in a proper case, find appellant guilty knowing that death would be a possible punishment for one of the crimes or stated that they would have tremendous difficulty in doing so.

In view of the above developments, all chronicled in the record, we believe the challenges for cause, complained of here, to be justified. This conclusion receives support from a footnote to *Witherspoon v. Illinois*, 391 U.S. 510 (1968):

> "We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the

trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." (p. 522, 523)

The first assigned error lacks merit and is overruled.

The second assignment of error reads:

> The Court erred in overruling the motion of the defendant to withdraw a juror and declare a mistrial for prejudicial statements of the prosecutor while talking to the court in the presence of the jury.

The record reflects that the prosecutor attempted to elicit from a state's witness testimony which would attribute a certain statement to appellant. Counsel for appellant objected and the objection was sustained. The witness did not repeat, under oath, any statement made to her by appellant.

Without passing upon the legal soundness of the trial court's ruling, we are unable to perceive, in light of the sustaining of the objection, any prejudice which would rise to that degree of error as to require a declaration of a mistrial.

The second alleged error is overruled.

The third assignment of error urges:

> The court erred in refusing to permit defense counsel to confer together during cross examination of a witness for the prosecution.

After a number of conferences between defense co-counsel, the court admonished the appellant's lawyers for the particular manner adopted by them for in-trial conferences. The record articulates no absolute prohibition against conferences during trial. The obligation of conducting an orderly trial rests with the court which possesses reasonable discretion with respect thereto. We perceive no abuse of discretion in the court's handling of the conference routine, and assignment of error three is overruled.

The fourth, fifth and seventh assignments deal generally with the same subject matter and will be disposed of concurrently. They assert:

> Fourth: The court erred in permitting re-direct examination of a prosecution witness as to other alleged crimes involving the defendant, over the objection of the defense.
>
> Fifth: The court erred in not instructing the jury as to the law of same and similar crimes at the time of the testimony of such crimes over the objection of the defendant and did not fully explain to the jury the purpose for which such testimony was admitted in its general charge to the jury.
>
> Seventh: The court erred in its instruction to the jury that the jury may consider evidence of other acts as proof that the defendant did act as alleged in the indictment.

The record reveals that appellant's counsel cross-examined a state's witness about her participation, with appellant, in various hold-ups which appellant engaged in. On re-direct examination the prosecutor pursued that line of questioning.

Those acts, which were the subject of the re-direct examination, are of the type contemplated by R. C. 2945.59, the so-called similar acts statute, which is reproduced below:

> In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

The witness testified that appellant had robbed a priest and his housekeeper and had locked them in the trunk of an automobile. (T.p. 545) The evidence of these acts, which the witness said

occurred approximately two weeks after the offenses charged in the present indictment must be said to be competent and admissible for the purposes indicated in R. C. 2945.59.

Although appellant's counsel objected to a number of the prosecutor's questions on the re-direct examination of the witness, there was never a request by counsel for the court to instruct the jury on the limited purpose of the evidence of similar acts. Nor was there any objection to the court's failure to do so. Any error which results because of a trial court's failure to give such an instruction is cured by so instructing the jury in the general charge at the conclusion of the case. This proposition of law is enunciated in *State v. Pope,* 171 Ohio St. 438 (1961) the first paragraph of the syllabus of which reads:

> Failure of the trial court in a criminal case to instruct the jury as to the purpose of testimony as to similar offenses charged to the accused and the manner in which it is to be considered, at the time such testimony is admitted, is not reversible error, where no request for such instruction is made and the court covers the matter adequately and correctly in the general charge.

A reading of the record reveals that although portions of the instructions reflect an improvidence in content, nevertheless, the entire charge, taken as a whole, fairly and adequately conforms to the law.

It follows that assignments four, five, and seven lack merit and must be overruled.

The verbatim sixth challenge states:

> The court erred in its instruction to the jury upon the charge of murder as was alleged in the indictment.[1]

[1] It is apparent to us, from the argument in support of this assignment, that appellant intends to challenge the court's instruction on the charge of aggravated murder, not simply murder.

After the court completed the general charge to the jury, inquiry was made of counsel as to whether any changes or additions were desired. The state pointed out to the court that there was an incorrect statement upon the charge of aggravated murder. Counsel for appellant did not disagree at that point and the court proceeded to correct that portion of the instruction about which a measure of ambiguity existed.

Now, for the first time, upon appeal, appellant's dissatisfaction with the charge as it related to aggravated murder is raised. Such procedure is inconsistent with Crim. R. 30, the pertinent portion of which follows:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

This rule forecloses appellant from prevailing on the sixth assignment of error. Nevertheless, we note that the court's correction of his instructions did result in a proper charge containing a valid explanation of the various elements of all the crimes charged.

The sixth assignment of error is overruled.

The next alleged error, the eighth, reads:

> The court erred in refusing to charge the jury on the included offense of aggravated (sic) murder (Sec. 2903.02 ORC) upon the request of the defendant.[2]

[2] From the state of the record and appellant's brief, it is clear that the inclusion of the word "aggravated" in this assignment is a mistake. Appellant requested an instruction on the included offense of murder.

The elements of aggravated murder, so far as our review here is concerned, are to "purposely cause the death of another while committing . . . aggravated robbery or robbery." [R.C. 2903.01(B)]. Murder is to "purposely cause the death of another." [R.C. 2903.02 (A)]. Appellant does not deny robbing the deceased victim. If the trier of fact concluded, as the jury obviously did, that Roberts purposely caused the death of another, he is guilty of aggravated murder, the robbery being undisputed.

Appellant was not entitled to an instruction on the crime of simple murder.

It follows that the eighth assignment of error is meritless and overruled.

The final asserted error claims that the verdict of the jury is manifestly against the weight of the evidence. In particular, appellant emphasizes that there was insufficient proof that appellant purposely caused the death of the victim vis-a-vis the aggravated murder charge. Furthermore, the final assignment also challenges the jury's obvious conclusion that Patricia Sue Ramey, one of the kidnapped women, was actually restrained of her liberty by defendant Roberts, i.e., against her will. A reading of the record, with special attention to these two contentions, indicates that the state adduced more than a sufficient amount of competent evidence which, if believed by the jury (as manifestly it was), would justify the verdicts which the jury returned.

The ninth assignment of error is overruled.

We affirm the judgment.

SHANNON, P. J., PALMER and KEEFE, J. J.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 77 TERM

To wit: January 14, 1977

State of Ohio,
Appellee,

vs.

William Roland Roberts,
Appellant.

No. 76-558

REHEARING

It is ordered by the court that rehearing in this case is denied.

FOR YOUR INFORMATION ONLY NOT FOR FILING

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this.....day of..... 19.....

.....Clerk.

By .....Deputy.

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CARTOLANO:

Q You are Donna Eddingfield?

A Yes.

Q Is it Mrs.?

A Yes.

Q Mrs. Eddingfield, do you still live at 3713 Mo[illegible]dge Drive in Green Township?

A Yes.

Q Mrs. Eddingfield, you are a prospective juror in a criminal case, and upon conviction of one of the charges in this case, one of the possible penalties is death in the electric chair. That is commonly called capital punishment.

Are you opposed to capital punishment as a form of punishment for crime?

A I don't know if I can say a straight yes or no. I don't know. I thought that was outlawed in Ohio, but I guess not. I don't know if I could.

Q You don't know?

A I don't.

Q Let me ask you another question. If you were a juror sitting here with eleven other people, and if a proper case were presented to you -- by that I mean if the law would permit it

and if the facts that you heard would warrant it -- could you join in a verdict with your fellow jurors knowing that your verdict could result in the death of a certain individual in the electric chair?

MR. WOODS: Now, if Your Honor please, I must object at this point to the way that question is put again. That is not the law of the State of Ohio. If we are going to ask this lady to commit herself to this, why don't we give her the proper law?

THE COURT: What is the proper law, Mr. Woods?

MR. WOODS: That she returns a verdict of guilty or not guilty, and then it is up to the Court to determine whether or not the punishment should be given.

THE COURT: Well, he gets to that in his next question. He has been following the same sequence down the line, and he does get to that and clarifies it.

MR. WOODS: All right, sir.

THE COURT: It is just a matter of semantics, I believe, Mr. Woods.

MR. WOODS: All right, sir.

BY MR. CARTOLANO:

Q You probably lost the question, didn't you?

A Yes.

Q Okay.

A I got the gist of it.

Q All right. Let me repeat it. If you were a juror and if a proper case were presented to you - - by that I mean if the law would permit it and if the facts that you heard would warrant it - - could you join in a verdict with your fellow jurors knowing that your verdict could result in the death of a certain individual in the electric chair?

A I don't think so.

Q You don't think you could? Let me ask you another question. I will go a step further. If you are selected as a juror, Mrs. Eddingfield, your sole duty would be one essentially of voting either guilty or innocent.

If you vote guilty, you are really not concerned directly with the punishment in this case. If you vote guilty, then there is going to be another hearing before the Judge, the Court, and after that hearing the Judge then will determine whether or not the punishment should be death or something else.

However, you would never get to that second hearing unless you voted guilty. So, what I am saying to you, if you voted guilty, you would have to know that one of the possible penalties because of your vote is death in the electric chair, even though you directly wouldn't be imposing that penalty.

Do you understand me? If you don't, please say so.

A Do they give death penalties?

Q We give death penalties in the State of Ohio, yes. Otherwise, we wouldn't be here, Mrs. Eddingfield.

A Very often?

Q Well, as often as people commit that type of crime, and they come to trial and the jurors convict, yes.

A Well, if I thought the person was guilty, I could say "guilty". But, if I thought - - - I don't think I would like to know that he was going to get death.

Q Okay. You understand in any trial there are two sides? There is what we call the plaintiff, and the defendant? You have heard of those phrases?

A Yes.

Q Or, those words. And, that is true in any type of a case. This is a criminal case, so there are two sides. There is the defendant who is charged with a crime, and you have heard that he is entitled to a fair trial, is that right?

A Yes.

Q You have always heard that all your life. Well, there is the other side of the trial of the case. We call that the State of Ohio. That is the plaintiff. The State of Ohio is really the people that live in this community. It is everybody that lives here.

Now, they have an interest in a criminal case. They are entitled to a fair trial too, isn't that right?

A Yes.

Q Would you agree with me? If you don't understand what I am saying, please say so.

A Yes, I agree.

Q You agree. Okay. We have got two sides. The defendant you are going to see throughout the trial. He is going to be sitting there and you can look at him all you want. Okay?

A Yes.

Q The other side, the people who live here, you're not going to see because, as I told these other two - - this lady and this gentleman - - there are too many. There is no court-room in the world that can hold almost a million people. But, they are entitled to a just verdict from you, isn't that right?

A Yes.

Q Okay. Now, we have all heard about capital punish-ment, haven't we?

A Yes.

Q We all have an idea what that means, isn't that right?

A Yes.

Q Okay. Now, you know as well as I know that some people are morally opposed to capital punishment, isn't that correct?

A Right.

Q And some people are against it for other reasons. If they are not moral reasons, they can have any reason they want, but they are against capital punishment. That's right, isn't it?

A Yes.

Q Now, you have been summoned here as a juror, is that correct?

A Right.

Q Okay. Now, I am a prosecutor and he is a prosecutor, and these two gentlemen are lawyers, and we have got a judge sitting up on the bench.

Now, if we are opposed to capital punishment, we don't have to be here. If I felt morally opposed to capital punishment, I wouldn't have to be here. If the Judge felt that way, he wouldn't have to be here. And, the lawyers certainly don't have to be here. They can refuse a case.

Now, the only one that really has to be here is the defendant, because he doesn't have a choice. Right?

A Right.

Q Now, you are in the same position as the prosecutor, the lawyers or the Judge. Now, you are summoned here by a subpoena, but you don't have to sit on this jury unless you can tell us under oath that you could follow the law of Ohio.

And, the law of Ohio does, Mrs. Eddingfield, provide for capital punishment.

A It does?

Q Yes, it does. I am not lying to you.

A Is that just new, or is that - - -

Q Well, we don't have to argue about the law. I mean, let's just accept it. It is there.

Now, my question to you, if you are going to be on this jury, can I rely on you and can you tell me under oath "Mr. Prosecutor, you have got nothing to worry about; I will follow the law and I will listen to the facts, and if the facts are there and if the law permits it and the other jurors vote that way, I can join in their verdict knowing that my verdict could result in the death of a certain individual in the electric chair."

Now, could you do that? Could you tell me under oath that you would do that and can I rely on you? And, I have got a right to rely on you, because as I told you, you don't have to be here. It is your decision.

THE COURT: Let her answer, please.

MR. CARTOLANO: Okay.

THE WITNESS: It is my duty. I don't believe in capital punishment, but - - -

BY MR. CARTOLANO:

Q Under any circumstances?

A Okay - - maybe I would have to - - - I guess I could. I would have to think long and hard on it.

THE COURT: If you don't mind, Mr. Cartolano - - -

MR. CARTOLANO: Surely, Your Honor.

THE COURT: Young lady, you say you don't believe in it and then you qualify your answer. Now, you're going to have to give me a yes or a no. It is that simple. All right?

THE WITNESS: Yes or no?

THE COURT: Yes. Answer yes or no.

THE WITNESS: No, I don't think I could.

THE COURT: She says she couldn't do it.

BY MR. CARTOLANO:

Q You don't think you could sit as a juror in a capital case?

THE COURT: I had it down to a yes or no.

MR. CARTOLANO: Well, all right.

THE COURT: I will excuse her, Mr. Cartolano.

MR. WOODS: If Your Honor please, may I ask her some questions?

THE COURT: All right, Mr. Woods.

CROSS-EXAMINATION

BY MR. WOODS:

Q Mrs. Eddingfield, I think what we are getting at is that you as a juror will sit here and listen to the evidence as presented to you, and Judge Wood will tell you the law that applies in the case, and you will then determine whether or not Bill Roberts is guilty or not guilty of a particular offense. That will be your sole determination, and you will have nothing to do with any possible punishment. That is left solely to the Court.

And I think then my question to you, ma'am, is could you sit here and listen to the evidence and the law, forget about possible punishment, and determine whether or not a person is guilty or not guilty of an offense? Could you do that?

A Yes.

MR. WOODS: We would resist the challenge for cause, Your Honor.

THE COURT: Ma'am, if you knew that your guilty verdict might end in a decision by the Court to cause the death of one William Roberts, could you still enter that verdict of guilty?

THE WITNESS: No.

THE COURT: All right. She is dismissed for cause. You may step down.

MR. WOODS: For the purpose of the record, may we

note our exception?

THE COURT: Mr. Woods, for the purpose of the record, the Supreme Court of Ohio gives you an exception to every one of my rulings.

MR. WOODS: I realize that, Your Honor.

THE COURT: All right.

CLAUDIA B. TUBBS,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CARTOLANO:

Q Your name is Claudia B. Tubbs?

A That's right.

Q Is it Mrs. Tubbs?

A Yes.

Q Mrs. Tubbs, do you still live at 8305 Monroe Street?

A That's right.

Q Mrs. Tubbs, you have been called in as a prospective juror in a criminal case, and one of the possible penaltics in this case, if there is a conviction, is death in the electric chair. We commonly call that capital punishment.

Are you opposed to capital punishment as a form of punishment for crime?

A Yes.

Q You are? If you were a juror in this case, Mrs.

THE WITNESS: Oh, no. I misunderstood.

THE COURT: Your challenge is over.

MR. WOODS: I have no further questions, Your Honor.

THE COURT: You may step up to chair number nine.

And, note Mr. Woods' exception.

MR. WOODS: Thank you, Your Honor. I forgot to do that.

ALMA H. NIEHAUS,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CARTOLANO:

Q Mrs. Niehaus - -

A Yes, sir.

Q Good morning.

A Good morning.

Q Mrs. Niehaus, you are a prospective juror in a criminal case. One of the possible penalties upon conviction is death in the electric chair. Most of us call that capital punishment.

Are you opposed to capital punishment as a form of punishment for crime?

A I am, sir.

Q You are opposed to it?

A Yes, sir.

Q How long have you had this opposition?

A Well, I just realized that a case like this would call for capital punishment.

Q Well, no. I mean, how long have you been against capital punishment?

A Practically all my life.

Q All your life?

A Yes.

Q It is not something that you have just thought up to get out of jury service?

A Oh, no, sir.

Q Is this a strong conviction with you?

A Very strong.

Q Well, could you visualize any circumstances where you could vote for capital punishment?

A No.

Q None whatsoever?

A No.

Q Let's suppose that you were a juror and a proper case were given to you - - that is, the law of Ohio would permit it and the facts that you heard would warrant it - - could you join in a verdict with the other jurors knowing that your verdict could result in the death of someone in the electric chair?

A No, I don't think so.

Q You could do it under no circumstances?

A No.

Q You couldn't visualize any type of a case that you could do that?

A No.

Q Well, you understand - - - well, you don't, but I will explain it to you, Mrs. Niehaus. If you are a juror, what you do is determine what the facts are. If you come back with a verdict of guilty of this charge, then there would be a second hearing in front of the Judge, and the Judge would hear other evidence, and it would be in fact the Judge who would determine whether or not the defendant would go to the electric chair or not. You would not do that directly, you would only be doing it indirectly.

Do you understand what I have said so far?

A Yes, sir.

Q This is sort of like a two-part trial?

A Yes, sir.

Q But, we would never get to the second part for the Judge's hearing unless you voted guilty. So, you would indirectly be participating in this series of events. Do you understand that?

A Yes, sir.

Q Now, after I have explained all that, do you think you could sit as a fair and impartial juror, or do you feel that your opposition to capital punishment would be paramount with you?

A I still think I would be against it, sir.

Q You would be against it?

A Yes, sir.

Q Well, we can't use the word "think", we have to be more precise. Can you tell me it will or it won't, without throwing in that word "think"?

A I think I would still be.

Q Please?

A I would be against it.

Q You would be against it?

A Yes.

MR. CARTOLANO: May we have her excused for cause, Your Honor?

THE COURT: Any objection?

MR. WOODS: If we may, just one question, Your Honor.

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. WOODS:

Q Mrs. Niehaus - -

A Yes.

Q Do you believe, ma'am, that you could sit and listen to the evidence in this case and return a verdict of guilty or not guilty and not be concerned about the punishment? Could you do that?

A Yes, I am really against capital punishment.

Q Well, that isn't what I mean, ma'am. You would not determine by your verdict of guilty or not guilty whether or not capital punishment should be inflicted or not. But, do you think you could listen to the evidance in a particular case, in this case, and determine whether or not Mr. Roberts was guilty of the charge with which he is indicted?

A (Pause)

THE COURT: She doesn't understand that question, Mr. Woods. She is not a lawyer.

MR. WOODS: I realize that, Your Honor.

THE COURT: You must understand that she is a lay witness.

MR. WOODS: I realize that.

THE COURT: I don't even know what her background is but she certainly doesn't understand that type of language.

BY MR. WOODS:

Q Well, I think, Mrs. Niehaus, what I am trying to get at is, would you listen to the evidence in this case and not

concern yourself with any possible punishment?

A On some punishment, but not capital punishment.

THE COURT: Well, that is a possibility, Mrs. Niehaus.

THE WITNESS: Yes.

THE COURT: If there is a guilty verdict, that is a possible punishment. It is not mandatory, but there is a possibility of it. Now, could you enter a verdict that might possibly mean capital punishment?

THE WITNESS: No.

THE COURT: That answers the question.

MR. WOODS: All right, Your Honor.

THE COURT: You may be excused, ma'am.

THE WITNESS: Thank you, sir.

MARY L. NEMAN,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CARTOLANO:

Q Good morning, Mrs. Neman?

A Who is speaking to me?

Q Right over here.

THE COURT: The gentleman over there.

BY MR. CARTOLANO:

Q Like a kind of a secret voice. Mrs. Neman, you are

heard all of the evidence and the law as I give it to you.

Do not read any newspapers or listen to the radio or television.

There will be a five-minute break. You can have your smoke, and we will be right back in. Don't discuss it with anybody in the back room.

(Short recess)

THE COURT: All right.

BETTY K. PIERCE,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CARTOLANO:

Q Good afternoon, Mrs. Pierce.

A Good afternoon.

Q Mrs. Pierce, you have been waiting yesterday and today as a prospective juror in a criminal case. One of the possible penalties on conviction of one of the charges in this case is death in the electric chair. Are you opposed to capital punishment as a form of punishment for crime?

A Yes, I am.

Q I recall you said that yesterday.

A Right.

Q How long have you been opposed to capital punishment?

A I have been opposed to it since I was a child in

Nebraska, and they executed a man that was not guilty and later was proved not guilty.

Q And your opposition has been adamant since that time?

A I wouldn't say it was adamant. I would say I was just feeling that if I were ever called upon to make a decision in a case such as this, that I would not feel qualified to do so.

At the time I was quite young, like about eleven years old, and ever since then I haven't discussed it with a lot of people, but I just feel this way.

Q Well, if you were a juror in this case, Mrs. Pierce, and what the law calls a proper case were presented to you -- by that I mean if the law would permit it and if the facts you heard would warrant it -- are you telling us that you would be prevented from joining with your fellow jurors in a verdict if you knew that your verdict could result in the death of a certain individual in the electric chair?

A I could not.

Q You could not?

A No.

MR. CARTOLANO: May we have her excused for cause, Your Honor?

THE COURT: Mr. Woods, do you want to ask her any questions?

MR. WOODS: Just one question, Your Honor.

CROSS-EXAMINATION

BY MR. WOODS:

Q Could you, ma'am, determine the guilt or innocence of an individual and forget about the penalty?

A I don't believe that I would want to pass my judgment, the way I feel, knowing that the verdict that the jury that I belong to would have the possibility of the death sentence.

Q Well, you realize, ma'am, it would not be your verdict that would dc this?

A I realize that. I realize that this is up to the Judge.

Q And even under those circumstances, you could still not do this?

A Absolutely I could not.

THE COURT: You are excused for cause, ma'am. Have a seat in the back.

ROSE NADELMAN,

being first duly sworn, was examined and testified as follows:

THE COURT: Just a moment, Mr. Cartolano. I have been advised that Mrs. Nadelman is hard of hearing.

Are you hard of hearing, ma'am?

THE WITNESS: No, sir.

THE COURT: My bailiff told me you were.

RUTH B. KLEIN,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CARTOLANO:

Q Your name is - - -

A Ruth Klein.

Q Is it Mrs. Klein?

A Yes.

Q Mrs. Klein, you have been summoned as a prospective juror in a criminal case. One of the possible penalties upon conviction of one of the charges in this case is death in the electric chair. We usually call that capital punishment.

Are you opposed to capital punishment as a form of punishment for crime?

A Yes.

Q You are opposed to it?

A Yes.

Q Have you had this opposition for a long period of time or is it something that you came up with in the last few days to get out of jury service?

A No, I just don't believe in it.

Q You do not believe in it. Are you opposed to it under any circumstances?

A I could never do it. I could never.

Q Could you ever indirectly participate in capital punishment?

A No.

Q Well, let's suppose that you were seated here as a juror, Mrs. Klein, and if a proper case were presented to you under the law of Ohio, and the facts would warrant it, could you join in a verdict with your fellow jurors knowing that your verdict could result in the death of not just anybody but a certain individual in the electric chair?

Could you do that?

A I just couldn't.

Q You could not?

A No.

MR. CARTOLANO: May we have an excuse for cause, Your Honor?

THE COURT: Do you want to ask her any questions, Mr. Woods or Mr. Crisci?

MR. WOODS: Just a couple of questions, Your Honor.

CROSS-EXAMINATION

BY MR. WOODS:

Q Mrs. Klein, forget about the possible penalty. Could you sit with your other jurors and determine whether or not a person was guilty or not guilty of a particular offense?

A I just couldn't sit in judgment.

Q Well, not in judgment, ma'am. I am asking you whether or not you could determine whether a person was guilty or not guilty of an offense. Forget about the punishment.

A Maybe.

Q Well, do you think, Mrs. Klein, that you could join with your other jurors and determine from the evidence that you will hear from the seat where you are now sitting, from the testimony of these people, the witnesses who will come in, and determine whether or not Bill Roberts is guilty or not guilty of the offense with which he is charged in the indictment, in this piece of paper that brings us all here?

A Well, I could then.

MR. WOODS: We will oppose the challenge for cause, Your Honor.

THE COURT: Well, I will ask the next question. Mrs. Klein, if you knew your guilty verdict might eventually cause the death of the defendant Mr. Roberts, could you then issue that verdict?

THE WITNESS: Oh, I would have to search my soul.

THE COURT: I know it is a hard thing to make decisions, ma'am, and as a matter of fact I am the one that has to make all the decisions, and sometimes I have to go home at night and roll around in bed and think about it. But, I do it, because this is my job. So many people

are afraid to make decisions. Sometimes we have to. We have no alternative.

I am going to excuse this juror for cause. You may have a seat in the back, ma'am.

DONALD L. LEININGER,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CARTOLANO:

Q Mr. Leininger?

A Yes, sir.

Q You have been sitting around waiting as a prospective juror, and you have been waiting to be called in on a criminal case. One of the possible penalties upon conviction of one of the charges in this case is death in the electric chair. Most of us call that capital punishment.

Are you opposed to capital punishment as a form of punishment for crime?

A No, sir.

Q If you were selected as a juror and if a proper case were presented to you - - by that I mean if the law of Ohio would permit it and if the facts you heard would warrant it - - could you join in a verdict with your fellow jurors knowing that your verdict could result in the death of not just anybody but a certain individual in the electric chair?

A I don't understand.

Q Fair both to the State and fair also to Bill Roberts?

A As fair as I can possibly be.

MR. WOODS: We will pass for cause, Your Honor.

THE COURT: Pass for cause. All right. Take seat number ten, young lady.

Does the defendant have any additional peremptory challenges?

MR. WOODS: If Your Honor please, we will excuse juror number four, Mr. Marshall.

THE COURT: That is your sixth challenge.

MR. WOODS: Yes, it is, Your Honor.

THE COURT: All right. Mr. Marshall, have a seat in the back, please.

ROY L. McCHESNEY,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CARTOLANO:

Q Mr. McChesney, good morning.

A Good morning.

Q Mr. McChesney, you are here and you have been here for the last few days waiting to walk in, which you have just done. You are a prospective juror in a criminal case, and one of the possible penalties on conviction of one of the charges

in this case is death in the electric chair. We call that capital punishment.

Are you opposed to capital punishment as a form of punishment for crime?

A I don't believe in killing a man. I don't believe that solves the problem.

Q Okay. Well, that doesn't answer my question, though, and that is my problem.

A I believe in capital punishment up to the death sentence. I believe in life imprisonment, but not death.

Q Well, are you opposed to capital punishment as a form of punishment for crime?

A No.

Q You're not opposed to it?

A No.

Q Well, let's suppose that you were sitting here as a juror and if the proper case were presented to you - - that is, if the law of Ohio permitted it and if the facts that you heard would fall within the law and would warrant it - - could you join in a verdict with your fellow jurors if you knew that your verdict could result in the death of not just anybody but a certain man in the electric chair? Could you do that?

A Well, if I was associated with the case long enough, I probably might, but right now, I have never been associated

with nothing like this.

Q Well, I understand that. I hope you would hear the evidence first.

A Yes.

Q But, my question is somewhat different. I know you don't know anything about this case.

A No.

Q And, we don't know anything about you.

A That's right.

Q And what we are trying to do is find out something about you, and if you are going to sit here you will find out something about the case, right?

A Yes, sir.

Q Okay. But, what I have got to know from you is what your feelings are about capital punishment.

A Well, I think everybody does have some - - -

THE COURT: I don't think he understands what capital punishment is.

THE WITNESS: Well, capital punishment, that is - - -

THE COURT: It is death.

THE WITNESS: Death?

THE COURT: Yes.

BY MR. CARTOLANO:

Q All right. I thought you said at first that you

didn't believe in killing anybody, is that correct?

A I believe in life imprisonment at hard labor.

Q You believe life imprisonment at hard labor is enough?

A Well, I would think that would hurt him worse than killing him.

Q Well, it all depends on who is on the other end. But, Mr. McChesney, without arguing about that, the question is this; we are not talking about life imprisonment here. We're talking about death in the electric chair.

Now, are you against an individual who has been convicted of a certain crime by the evidence - - are you opposed to that individual, either morally or philosophically against him going to the electric chair?

A No, I wouldn't be against it. I just don't really believe in it. So, I don't believe I would convict him to death in the electric chair.

Q You wouldn't convict him?

A I don't think I would.

Q You don't think you would convict a man if you thought he was going to go to the electric chair?

A I don't believe so.

Q Well, you have to tell me.

A No.

Q "No" is your answer?

A Yes, sir.

MR. CARTOLANO: We challenge for cause, Your Honor.

THE COURT: Mr. Woods or Mr. Crisci?

CROSS-EXAMINATION

BY MR. WOODS:

Q Mr. McChesney, I think very possibly what we are getting at, sir - - and maybe Mr. Cartolano didn't explain it to you, you as a juror in this case, along with your other jurors, would determine whether or not the State has proven a person guilty of a crime.

A Yes.

Q And you with the other jurors would return a verdict finding that person either guilty or not guilty. You would have nothing to do with the punishment. The punishment is left up to the Judge.

Under those circumstances, sir, do you think you could sit and return a verdict where one of the possible penalties - - eventual penalties - - could be that the person was put to their death in the electric chair?

A I guess I could, depending on the law and the person and what he did.

MR. WOODS: That's right. We will oppose the challenge for cause, Your Honor.

THE COURT: The challenge for cause will be granted. You may step down, sir.

Call another prospective juror.

MR. CRISCI: Would you note our exception to that ruling, please.

THE COURT: Yes.

DOLPHUS D. McCLURE,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CARTOLANO:

Q Good morning, Mr. McClure.

A Good morning, sir.

Q Mr. McClure, you are here as a prospective juror in a criminal case. One of the possible penalties on conviction of one of the charges in this case is death in the electric chair. We call that capital punishment.

Are you opposed to capital punishment as a form of punishment for crime?

A Yes, sir.

Q You are opposed to it?

A Yes, sir.

Q How long have you had that opposition?

A Well, I think for a long time, but I have never had to face it. But, I have often thought in my own mind I was

opposed to it.

Q Well, just for the record, you haven't gotten this opposition while you have been waiting for jury duty, to get out of an unpleasant service?

A No. This has come up in my own thinking many times before I even knew the procedure and whatnot here.

Q Well, I have to ask you another question, Mr. McClure. In view of your moral or philosophical opposition to capital punishment, let's suppose that you were seated here as a juror and a proper case were presented to you - - that is, if the law of Ohio permitted it and if the facts under the law would warrant it - - would you be prevented from joining in a verdict with your fellow jurors if you knew that your verdict could result in the death of not just anybody but a certain individual in the electric chair?

A I think I would be very perplexed as to whether I could do it or not.

THE COURT: You have got to answer yes or no, sir.

THE WITNESS: Would you repeat the question, please.

BY MR. CARTOLANO:

Q Well, the question is this, if you were sitting as a juror and if you knew that your verdict, if it were guilty, could result in the death of the defendant, who is going to be in the courtroom with you the whole time - - if you knew that

could result in his death in the electric chair - - would that prevent you from giving an honest verdict?

A Yes.

Q It would prevent you?

A Yes.

MR. CARTOLANO: May we have an excuse for cause, Your Honor.

THE COURT: Mr. Woods or Mr. Crisci.

CROSS-EXAMINATION

BY MR. WOODS:

Q Mr. McClure, I think very possibly we should explain to you a little further that along with your fellow jurors you would just determine the guilt or innocence of the person and it would be up to the Court, the Judge, at a future hearing to determine what punishment if any should be given if your verdict should be guilty.

Under those circumstances, sir, do you think you could join with your other jurors in determining the guilt or innocence of that person?

A Well, it would be in the back of my mind that there is always that possibility. I think I would probably feel it and it would bother me.

Q Well, it may bother you, sir, and it may bother a lot of us, but could you join with your fellow jurors in

determining the guilt or innocence of the person?

A Yes.

THE COURT: You have to continue it all the way through, counsel, because you have to give him the whole question, the guilt or innocence and possibly knowing that if you find the defendant guilty that there is a possibility that he could be put to death in the electric chair.

Could you do that, sir?

THE WITNESS: No, I don't think I could.

THE COURT: He just answered three times that he couldn't.

All right, you are excused for cause.

Bring out another prospective juror.

LESSETTE B. GREENE,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CARTOLANO:

Q Mrs. Greene, good morning.

A Good morning.

Q You are here as a prospective juror in a criminal case, and one of the possible penalties upon conviction of one of the charges in this case is death in the electric chair. Most of us call that capital punishment.